

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 02-11909-RWZ

GARY J. COLASSI

v.

CYBEX INTERNATIONAL, INC.

ORDER ON MOTIONS IN LIMINE

August 16, 2005

ZOBEL, D.J.

Both parties have filed motions in limine that pertain to the impending trial. The motions were attached as exhibits C and D to the parties' pretrial memorandum. (#104 on the court's docket). I address them in the order in which the parties arranged them.

Plaintiff's Motions - Exhibit C

1. Plaintiff moves to exclude evidence of defendant's effort "to design around the patent," both for failure to disclose the proposed evidence earlier except by defendant's damages expert and because it is hearsay. Although hearsay, defendant asserts the evidence is the sort experts usually rely on.

The motion is allowed. It is hearsay and offered largely for the truth of the statements. Moreover, it is difficult to see the relevance to the damages calculations.

2. Plaintiff anticipates that defendant will offer license agreements to support its position on the calculation of a reasonable royalty. This motion seeks to exclude this evidence on the grounds that defendant had failed to produce such agreements

pretrial. Defendant says that it produced one, albeit late, a license to Krull, which is the only patent license and thus the only one “relevant” to the damages calculation.

Others cited by plaintiff, defendant says, are not with defendant.

To the extent that the licenses not produced are, according to defendant, not relevant, the motion to exclude them is allowed on relevance grounds. It is denied as to the Krull license and as to any brought to the table during the deposition of defendant’s damages expert, John Jarosz.

3. Plaintiff moves to preclude defendant from arguing non-infringement under the reverse doctrine of equivalence.

The motion is allowed because defendant has cited no persuasive facts to support the theory in this case. And, as defendant concedes, Amgen, Inc. v. Hoechst Marion, Inc. 339 F. Supp. 2d 202 (D. Mass. 2004), which gave credence to the theory, nonetheless found it inapplicable on the facts.

#### Defendant’s Motions - Exhibit D

1. Defendant moves to exclude hearsay statements by third parties as to the efficacy of plaintiff’s invention.

The motion is allowed. Plaintiff’s state of mind on this issue does not appear to be relevant, and the exception for present sense impression does not apply.

2. This motion attempts yet, again, to adjust the court’s claim construction by proscribing specific evidence and argument inconsistent with defendant’s view.

Nevertheless, the motion is allowed. Plaintiff shall not offer evidence or argue in a manner inconsistent with the court’s claim construction, but what specific evidence

and arguments fit within this ruling are left for trial.

3. The motion to preclude references to prior court orders as reflecting wins and/or losses by one side or the other is moot as plaintiff agrees not to so characterize any ruling.

4. The motion to preclude references to the strength of the patent and the like is denied. Plaintiff shall, however, behave.

5. The motion to preclude reference to the relative size of the parties is denied, but, again, the parties shall adhere to the rules of relevance and propriety.

Defendant's Motion for Reconsideration of Claim Construction (#102)

Because the court's decision on claim construction is fully compliant with Phillips v. AWH Corp. \_\_\_ F. 3d \_\_\_, (Fed. Cir. July 12, 2005), the motion for reconsideration is denied.

\_\_\_\_\_  
DATE

\_\_\_\_\_  
/s/ Rya W. Zobel  
RYA W. ZOBEL  
UNITED STATES DISTRICT JUDGE